

**Meimaris v Shargiya**

2008 NY Slip Op 32085(U)

June 30, 2008

Supreme Court, Nassau County

Docket Number: 8327-05/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**MARIA MEIMARIS,  
Plaintiff,**

**Motion Sequence #1  
Submitted April 17, 2008  
XXX**

**-against-**

**INDEX NO: 18327/05**

**IMAD AL SHARGIYA,  
Defendant.**

**The following papers were read on this motion:**

|                                       |          |
|---------------------------------------|----------|
| <b>Notice of Motion.....</b>          | <b>1</b> |
| <b>Affirmation in Opposition.....</b> | <b>2</b> |
| <b>Reply Affirmation.....</b>         | <b>3</b> |

Defendant, IMAD AL SHARGIYA, moves for an order, pursuant to CPLR §3212 and Insurance Law §5102 and §5104, granting summary judgment dismissing the action on the ground that plaintiff, MARIA MEIMARIS, has not sustained a "serious injury" as defined by Insurance Law §5102(d). Counsel for plaintiff opposes the motion, which is determined as follows:

Plaintiff commenced this action for injuries allegedly sustained in an automobile collision that occurred on May 23, 2001, at approximately 11:50 A.M., on the westbound side of the Long Island Expressway, at or near its intersection with the Maurice Avenue exit in Queens County, New York. Counsel for moving defendant states that the record reflects

that plaintiff did not seek immediate medical treatment at the time of the accident (Deposition Transcript, Exhibit "D" to moving papers, p.27); that there were numerous gaps in her treatment following the accident (pp.27,32,39,41); that she was treated until sometime in August/September 2001, less than four (4) months following the accident (p.32); that she was involved in a prior motor cycle accident in 1994 and a subsequent motor vehicle accident approximately one (1) month after the subject accident (pp.50-52); that following the subsequent accident, she was removed from the scene by ambulance (pp.53-52) and missed a week of work and several days thereafter for doctor appointments (pp.63-62; that she only returned to therapy after the birth of her son in 2003 and that she had a rough pregnancy; that she did not miss any work as result of the subject accident and was working as a bartender at the Dart Inn at said time (p.60); that she returned to work four (4) days after the accident and is not claiming any lost wages as a result of the accident (pp.61,62, 64). Counsel points out that, although plaintiff testified that she had no prior injuries to her neck and back (p. 52), her medical records refer to a prior work related accident where she sustained injuries to her lower back. Movant annexes, as Exhibit "D", copies of plaintiff's medical records from Dr. Rina Cararella of ProHEALTH Care Associates, LLP, which indicate a long history of lower back pain. Also annexed as Exhibit "F", is a copy of a CT scan of the plaintiff's thoracic spine performed in December 2003, which revealed scoliosis, degenerative spurring and no evidence of fracture or disc herniation. Plaintiff testified that she is not currently being treated by anyone for injuries sustained in the accident and has no future appointments scheduled (pp.48, 49.).

Plaintiff commenced the action on or about October 29, 2003, with the filing of a summons and complaint, and alleged that she sustained serious and severe personal

injuries that were caused by the negligence of the defendant. After joinder of issue, plaintiff served a bill of particulars in which she alleged that she sustained the following serious and permanent personal injuries: reversal of the normal cervical spine; cervical radiculopathy, lumbosacral radiculopathy, cervical sprain/strain; lumbar sprain/strain; depression; headaches; anxiety; fear; emotional upset and shock.

In support of the motion to dismiss, in addition to plaintiff's deposition testimony, counsel for defendant submits the affirmed report Louis J. Lombardi, M. D., an orthopedist, dated June 28, 2005 (Exhibit "G"), who examined plaintiff on said date and reviewed her medical records. Dr. Lombardi found plaintiff to have a normal cervical lordosis, no spasm or restriction of movement, and no deficit of motor, sensory or reflex functions in the upper extremities. He also found no restriction of movement in plaintiff's thoracolumbosacral spine and that her motor sensory and reflex functions in the lower extremities were normal. After range of motion testing and other objective tests, Dr. Lombardi concluded that there was no objective clinical evidence of any permanent injury to plaintiff's cervical or thoracolumbosacral spines and no objective clinical evidence of S1 radiculopathy. Dr. Lombardi opined that plaintiff does not have a permanent orthopedic disability and she has no restrictions to her activities of daily living.

Defendant also submits the affirmed report of Stephen M. Neuman, M.D. a neurologist, dated June 30, 2005, (Exhibit "H"), who examined plaintiff on said date and reviewed her medical records. After a complete neurological exam, Dr. Neuman found no objective findings to substantiate plaintiff's continuing subjective complaints. He found no clinical correlations with any electrodiagnostic abnormalities involving plaintiff's right lower extremity.

Counsel for defendant asserts that summary judgment is appropriate because plaintiff has not sustained any injuries that satisfy the threshold requirements of “serious injury” under the law. Counsel argues that plaintiff has not sustained a “permanent loss” or a “permanent or consequential limitation”, nor has she sustained a “significant limitation” or a medically determined non-permanent injury which prevented her from performing her usual activities for 90 out of the first 180 days following the subject accident. Moreover, counsel for defendant points out that there is more than a three (3) year gap in treatment for which plaintiff provides no explanation other than her hectic schedule. Based on the foregoing, counsel for defendant urges that summary judgment be granted.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387 [C.A. 1957]; *Bhatti v Roche*, 140 AD2d 660, 528 NYS2d 1020 [2<sup>nd</sup> Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant’s favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney’s affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 489 NYS2d 884, 479 NE2d 229 [C.A.1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to

lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2d Dept 1998]). Conclusory allegations are insufficient and to defeat the application the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Doran v Mutual Benefit Life Insurance Co.*, 106 AD2d 540, 483 NYS2d 66 [2<sup>nd</sup> Dept. 1984]; *Bethlehem Steel Corp. v Solow*, 70 AD2d 850, 418 NYS2d 40 [1<sup>st</sup>. Dept. 1979]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 [C.A. 1980]; *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2<sup>nd</sup> Dept. 1989]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102(d) (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A.1982]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Qu v Doshna*, 12 AD3d 578, 785 NYS2d 112 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d

747, 807 NYS2d 658 [2d Dept 2006]; *Mondi v Keahan*, 32 AD3d 506, 820 NYS2d 625 [2d Dept 2006]).

Applying the aforesaid criteria particularly to the reports of Dr. Lombardi and Dr. Newman, together with plaintiff's deposition transcript, the Court finds that the defendant has established a *prima facie* case that the plaintiff failed to sustain a serious injury (*Gaddy v Eyler, supra*; see also, *Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). As set forth above, Dr. Lombardi found no demonstrated signs of permanency, disability or impairment. Dr. Neuman opined that plaintiff has not sustained a neurologic injury or disability as result of the motor vehicle accident of May 23, 2001. Dr. Lombardi stated the specific tests upon which his medical conclusions were based and compared the plaintiff's ranges of motion to those ranges of motion considered normal. (*Qu v Doshna, supra*; *Browdame v Candura, supra*). Moreover, plaintiff's deposition testimony does not support a finding that plaintiff sustained a medically determined injury that prevented her from performing substantially all of her regular daily activities for a period of 90 of the first 180 days following the accident. Thus, the burden now shifts to the plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott, supra*).

In opposition to the motion, counsel for plaintiff asserts that the motion must be denied because the motion for summary judgment fails to dispute the existence of cracked/chipped teeth, TMJ, and the loss of range in motion in her cervical and lumbar spines. However, counsel for moving defendant points out that plaintiff has never pled, by bill or particular or any other pleading that she was claiming an injury to her teeth or jaw.

Accordingly, the Court will not consider said newly claimed injuries first raised post filing of the Note of Issue. Moreover, the affirmed report of Andrew S. Della Pietra, DMD., the dentist who treated plaintiff on June 6, 2001, shortly after the accident, makes no mention whatsoever of cracked/chipped teeth, but rather, in conclusory fashion, suggests that there is a causal relationship between plaintiff's injuries and the accident of May 23, 2001, because many whiplash patients experience TMJ dysfunction post accident. Although Dr. Della Pietra diagnoses plaintiff with, *inter alia*, TMJ, tinnitus and whiplash, and states that the estimated treatment time is six (6) months, no mention is made of chipped or cracked teeth. He finds that permanent impairment will be determined when the plaintiff reaches maximum medical improvement, however, no followup care or determination is documented by the plaintiff and the Court finds Dr. Pietra's report to be of no probative value.

Additionally, plaintiff relies on the unsworn reports of Inna Rozenstsvit, M.D., a neurologist, dated June 27, 2001 and July 6, 2001. Counsel for plaintiff argues that said unsworn reports should be considered as competent medical evidence because the defendant's own IME doctors relied on them, citing *Gibson v. Tordoya*, 44 AD3d 1000, 844 NYs2d 431 (2<sup>nd</sup> Dept. 2007). In *Gibson*, the Court found plaintiff raised a triable issue of fact as to whether she sustained a permanent consequential limitation of use of her cervical and/or lumbar spine as a result of the accident, because the neurologist in that case opined in his report, based upon his review of contemporaneous range of motion tests and his *recent* examination of the patient's MRI reports, that plaintiff had bulging discs and limitations in range of motion. In the case at bar, no such evidence exists—plaintiff has

not been recently examined by a physician, no cat scan or MRI's of her lumbar or cervical spines exist, and no objective evidence has been submitted by a doctor on behalf of plaintiff showing any limitation of range of motion. The Court finds that the cited case is not controlling.

Nor does plaintiff provide any objective medical evidence that she was unable to perform her customary activities for at least 90 of the first 180 days following the accident. Plaintiff's subjective claims of pain will not suffice. *Grossman v Wright* 268 AD2d 79, 707 NYS2d 233 (2<sup>nd</sup> Dept. 2000). Nor is there any explanation for the more than three (3) year gap in treatment. Other than her affidavit that she still feels pain in her back which interferes with her life on a daily basis, no objective medical evidence has been provided that her back pain was caused by the subject accident.

In *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (C.A. 2005), the Court of Appeals held that a gap in treatment would interrupt the chain of causation between the collision and the alleged injury. While cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so (*Pommells v Perez, supra; see also Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2<sup>nd</sup> Dept. 2005]).

Courts that have applied *Pommells v Perez, supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same exacting scrutiny should be applied to the plaintiff's explanation that the gap or

cessation of treatment occurred when the no-fault benefits stopped.

The plaintiff has not met her burden. Plaintiff has failed to provide any explanation for the gap in treatment of her alleged "serious injury". She testified at her deposition that she lost no time from work and was not seeking compensation for lost wages. Cf., *Hernandez v Cerda*, 271 AD2d 569, 707 NYs2d 332 (2<sup>nd</sup> Dept. 2000)


Based on the foregoing, the Court concludes that plaintiff has not sustained a "serious injury" and has failed to raise a triable issue of fact that requires a trial. Accordingly, it is hereby

**ORDERED**, that defendant's motion for summary judgment dismissing the complaint is granted and the action is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 30, 2008

  
WILLIAM R. LaMARCA, J.S.C.

TO: Harmon & Linder, Esqs.  
Attorneys for Plaintiff  
42 Broadway, Suite 1227  
New York, NY 10004

McCabe, Collins, McGeough & Fowler, LLP  
Attorneys for Defendant  
346 Westbury Avenue  
Carle Place, NY 11514

**ENTERED**

JUL 22 2008

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COUNTY CLERK'S OFFICE